No. 91-1729

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA
AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

STATE OF TEXAS
AND
TEXAS DEPARTMENT OF HUMAN RESOURCES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the United States retains its common-law right to collect prejudgment interest on debts owed by the States.

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The Solicitor General, on behalf of the United States and the United States Department of Agriculture, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a), is reported at 951 F.2d 645. The opinion and judgment of the district court (App., *infra*, 15a-29a, 30a-31a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Debt Collection Act of 1982, Pub. L. No. 97-365, § 11, 96 Stat. 1755-1756, as amended, 31 U.S.C. 3701(c), 3717, and the regulations promulgated thereunder, 4 C.F.R. 102.13(i), are reproduced at App., *infra*, 46a-48a.

STATEMENT

1. Congress adopted the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749,[1] to enhance and render more efficient the federal government's efforts to collect debts. See 96 Stat. 1749, Preamble. The Act requires federal agencies to assess interest on debts owed them, 31 U.S.C. 3717(a)(1), and to impose "a penalty charge of not more than 6 percent" on debts not paid within 90 days. 31 U.S.C. 3717(e)(2). Each federal agency must also assess "a charge to cover the cost of processing and handling a delinquent claim." 31 U.S.C. 3717(e)(1).

Section 3717, the provision of the Act governing imposition of interest and penalties, applies only to debts owed the United States by any "person." 31 U.S.C. 3717(a)(1). The Act provides that, for purposes of Section 3717, the term "person" does not include "an agency of the United States Government,

[1] Pursuant to Pub. L. No. 97-452, § 1, 96 Stat. 2469-2474, the pertinent provisions of the Act were codified at 31 U.S.C. 3701, 3716-3719. As part of that codification, various non-substantive changes were made.

of a State Government, or of a unit of general local government." 31 U.S.C. 3701(c). This case presents the question whether the Act's exclusion of state and local governments from the scope of Section 3717 had the effect of abrogating the federal government's pre-existing common-law right to seek prejudgment interest on debts owed by those governmental entities.

2. The debts involved in this litigation arise from Texas's participation in the Food Stamp Program. Under that program, the Food and Nutrition Service (FNS) of the United States Department of Agriculture provides food stamp coupons to participating States for distribution to qualified individuals and households based on need. 7 U.S.C. 2013(a), 2014. The cost of the food stamps is borne entirely by the United States; the cost incurred by the participating State in the administration of the program is divided equally between the state and federal governments in most cases. 7 U.S.C. 2025(a).

The Food Stamp Program regulations allow participating States to distribute food stamp coupons by mail. 7 C.F.R. 274.3. States that elect to utilize that distribution method are, however, obligated to reimburse the federal government for a portion of the cost of replacing coupons that are lost or stolen in the mail and later redeemed by persons other than the intended recipients.[2] 7 U.S.C. 2016(f). States must make reimbursement for all such mail issuance losses in excess of a "tolerance level" established by regulation. 7 C.F.R. 276.2(b)(4).

3. At all times pertinent here, the State of Texas was a voluntary participant in the Food Stamp Pro-

[2] Food stamp coupons are negotiable obligations of the United States, redeemable at face value for approved food products. 7 U.S.C. 2013, 2016. Thus, they can easily be used by persons other than the intended recipient.

gram, and as such had agreed to abide by the program regulations. The State utilized the mails for a large proportion of its food stamp deliveries, and suffered substantial losses in excess of the loss tolerance limits, in part as a result of theft by United States Postal Service employees. App., *infra*, 2a.

The State's mail issuance losses in excess of the tolerance limits amounted to $150,350 for the period from April 1986 through September 1986, and $262,035 for the period from October 1986 through March 1987. The FNS notified the State of its liability for those losses, and further advised the State that interest would begin to accrue on the balance outstanding unless payment was made within 30 days. App., *infra*, 3a.

The State sought administrative relief, asking the FNS's State Food Stamp Appeals Board to grant waivers of the State's liability for the mail issuance losses. After conducting administrative hearings, the Appeals Board denied relief. App., *infra*, 3a.

4. The State brought suit against petitioners in the United States District Court for the Western District of Texas, seeking judicial review of the Appeals Board's refusal to grant waivers of its liability for the mail issuance losses. The State contended that its excess mail losses should have been waived because a portion of those losses was caused by Postal Service employee theft. The State further claimed that the Debt Collection Act of 1982 precluded the imposition of interest on any amounts owed the federal government by the State.

The district court granted summary judgment in favor of petitioners on both issues. App., *infra*, 30a-31a. The court held that the decision whether to grant a waiver of the State's liability was unreviewable because it was committed to agency discretion by

law, citing *Heckler* v. *Chaney*, 470 U.S. 821 (1985), and *Webster* v. *Doe*, 486 U.S. 592 (1988). App., *infra*, 19a-22a. The court ruled in the alternative that the denial of the State's requests for waivers was not arbitrary or capricious. *Id.* at 25a-26a.

The district court also concluded that the United States was entitled to receive prejudgment interest on the amounts owed by the State. The court acknowledged the existence of a circuit conflict on that issue, but adopted the views of the Tenth Circuit in *Gallegos* v. *Lyng*, 891 F.2d 788 (1989), which held that the federal government's common-law right to prejudgment interest from a State survived the enactment of the Debt Collection Act. App., *infra*, 26a-27a, 28a-29a. The district court also rejected the State's contention that, under *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1 (1981), imposition of prejudgment interest on the State was impermissible because the Food Stamp Act did not itself authorize such interest. The court explained that *Pennhurst* does not apply to the use of existing remedies against a State that fails to satisfy its duties under a federal program. App., *infra*, 27a-28a, citing *Bell* v. *New Jersey*, 461 U.S. 773 (1983).

5. The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-14a. The court agreed that the Appeals Board's decision not to waive the State's liability for excessive food stamp mail issuance losses was not judicially reviewable, and thus rejected the State's challenge to the district court's ruling on that issue. App., *infra*, 5a-7a. The court reversed, however, that portion of the district court's judgment requiring the State to pay prejudgment interest. App., *infra*, 7a-13a.

The court of appeals began its analysis by noting the existence of a circuit conflict on the prejudg-

ment interest issue. App., *infra*, 7a (citing *Perales* v. *United States*, 751 F.2d 95 (2d Cir.) (per curiam), aff'g 598 F. Supp. 19 (S.D.N.Y. 1984) (rejecting federal government's claim to prejudgment interest); *Pennsylvania Dep't of Public Welfare* v. *United States*, 781 F.2d 334 (3d Cir. 1986) (same); *Arkansas* v. *Block*, 825 F.2d 1254 (8th Cir. 1987) (same); and *Gallegos* v. *Lyng*, 891 F.2d 788 (10th Cir. 1989) (allowing federal government's claim for prejudgment interest)). Aligning itself with the Second, Third, and Eighth Circuits, the court held that "the Debt Collection Act of 1982 abrogated the federal common-law right to assess interest on outstanding debts of the states incurred under the mail issuance loss provision of the Food Stamp Act." App., *infra*, 13a.

The court agreed that there was "no discernible legislative history to guide us with this question," and that the purpose of the Debt Collection Act was "to tighten the collection process and create incentives for the timely payment of debts to the United States." App., *infra*, 10a, 11a. The court rejected, however, the argument that abrogation of the United States' common-law right to prejudgment interest would create incentives for States to delay payment of their obligations under the Food Stamp Program, asserting that the federal government could enforce its claims against the States through administrative offset procedures. App., *infra*, 11a, citing 7 U.S.C. 2016(f), 2022(a); 7 C.F.R. Pt. 276. The court found inapplicable the principle that implied repeals of the common law are disfavored, holding that Congress had expressly chosen to exclude States from the category of persons liable for prejudgment interest. For the same reason, the court also declined to defer to

the contemporaneous construction of the Act by the implementing agencies. App., *infra*, 11a-12a.

Finally, the court drew additional support for its conclusion from *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). The court noted that *Pennhurst* requires Congress to speak unambiguously when it seeks to impose conditions on the States pursuant to the spending power, and apparently concluded that *Pennhurst* governed in this case because the question of prejudgment interest was controlled by the applicable statutes. App., *infra*, 13a.

REASONS FOR GRANTING THE PETITION

The question whether the United States retains its common-law authority to seek prejudgment interest on debts owed by the States was expressly reserved by this Court in *West Virginia* v. *United States*, 479 U.S. 305, 312 n.6 (1987). The courts of appeals are divided on that question, which is one of considerable importance to the administration of state-federal cooperative grant and welfare programs. Accordingly, review by this Court is warranted.

1. As the district court and court of appeals below correctly noted, the circuits are in disagreement over the effect of the Debt Collection Act of 1982 on the United States' preexisting common-law right to collect prejudgment interest from the States and their political subdivisions. In addition to the Fifth Circuit in this case, three other courts of appeals—the Second Circuit in *Perales* v. *United States*, 751 F.2d 95, 96 (per curiam), aff'g 598 F. Supp. 19, 23-26 (S.D.N.Y. 1984), the Third Circuit in *Pennsylvania Dep't of Public Welfare* v. *United States*, 781 F.2d 334, 341-342 (1986), and the Eighth Circuit in

Arkansas v. *Block*, 825 F.2d 1254, 1258 (1987)—have ruled that the Debt Collection Act abrogates the federal government's right to seek prejudgment interest against state and local government entities. The Sixth and Tenth Circuits, on the other hand, have reached the opposite conclusion. See *Gallegos* v. *Lyng*, 891 F.2d 788, 795-800 (10th Cir. 1989); *County of St. Clair* v. *United States Dep't of Labor*, 754 F.2d 375 (6th Cir. 1984) (Table).[3]

The relevant arguments have been canvassed at length by the courts of appeals that have addressed this question, and the circuit conflict does not appear likely to resolve itself with the passage of time. Congress has given no indication that it is prepared to effect a legislative solution, and the two most recent appellate court decisions on the subject reached contrary results. See App., *infra*, 1a-14a; *Gallegos* v. *Lyng*, *supra*. Absent review by this Court, therefore, the present state of the law will likely remain unchanged. Because it is anomalous and inequitable for the federal government to be permitted to collect prejudgment interest from some States but not from others similarly situated, review by this Court is warranted.

2. The court of appeals erred in rejecting petitioners' claim to prejudgment interest from the State.

a. In *West Virginia* v. *United States*, 479 U.S. at 310, this Court reaffirmed "the longstanding [common-law] rule that parties owing debts to the Federal Government must pay prejudgment interest

[3] The Sixth Circuit's decision in *County of St. Clair* is unpublished. Nonetheless, that decision may be cited as precedent on the prejudgment interest issue within the Sixth Circuit, given the absence of published circuit precedent on that issue. 6th Cir. R. 24(c).

where the underlying claim is a contractual obligation to pay money," and applied that rule to a debt owed to the United States by a State. Nothing in the text or legislative history of the Debt Collection Act evinces any congressional intent to abrogate that common-law rule as applied to the debts of state and local governmental entities.

To be sure, those governmental entities are not "person[s]" subject to the Act's provisions for imposition of interest, 31 U.S.C. 3701(c), 3717, and thus the Act does not itself *authorize* the federal government to collect interest from them, but nothing in the Act suggests that it affirmatively *precludes* collection of prejudgment interest from state and local governments under other law.[4] Congress's mere refusal to legislate with respect to the interest obligations of state and local governments falls far short of an expression of legislative intent to supplant the existing common law in that area.

[4] The court of appeals reasoned that Section 3717(g)(1), which renders Section 3717 inapplicable "if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges," was intended to allow "Congress to legislatively pick and choose where the imposition of interest is necessary." App., *infra*, 12a. According to the court, Congress's failure to impose prejudgment interest under the Food Stamp Act in express terms is fatal to the federal government's claim. *Ibid.* In suggesting that Section 3717(g)(1) sheds light on the interest obligations of state and local govermental entities, however, the court of appeals ignored the fact that those entities are not subject to the provisions of Section 3717 in the first place. 31 U.S.C. 3701(c). The obvious purpose of Section 3717(g)(1) was to allow for case-specific avoidance of the requirements of Section 3717 in circumstances where it would otherwise apply, not to cover the situation of debtors already exempted from that Section.

The court of appeals rejected the common-law rule in reliance on what is, at most, an ambiguity created by the Act's inapplicability to state and local governments. In effect, the court reasoned that Congress affirmatively chose to create an incentive for state and local government debtors to delay payment of debts owed to the United States, and did so without any discussion or debate as part of a bill intended to *eliminate* incentives for such conduct. "[S]uch reticence while contemplating an important and controversial change in existing law is unlikely . . . . At the very least, one would expect some hint of a purpose to work such a change, but there was none." *Gallegos* v. *Lyng*, 891 F.2d at 799 (quoting *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979)).[5]

[5] The court of appeals was unpersuaded by the inconsistency between its result and the purposes of the Act, because it did "not agree that the states will have an incentive to shirk their debts incurred under the Food Stamp Act if no interest is allowed." App., *infra*, 11a. The court reasoned that the federal government could recover unpaid claims by withholding future payments to which the debtor State would otherwise be entitled. What the court failed to recognize, however, is that "the filing of a timely appeal and request for administrative review shall automatically stay the action of FNS to collect the claim asserted against the State agency." 7 C.F.R. 276.7(e). Thus, unless the federal government is permitted to charge prejudgment interest on state debts, a State would have an incentive to seek administrative review of all claims regardless of merit. Moreover, the fact that the Food Stamp Program may in some circumstances allow the federal government to reduce its losses by using the administrative offset procedure is not relevant to the statutory construction question at hand, because the ruling of the court below would apply across the board to all federal agencies and programs that lack express statutory authorization for the collection of prejudgment interest.

Thus, there is no basis for concluding that Congress affirmatively sought to overturn the settled common law in this area.[6] Accordingly, the common law should be given effect, pursuant to the well established rule that "[s]tatutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). See also *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2169-2170 (1991); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Env'tl Protection*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

b. The court of appeals also erred in failing to defer to the contemporaneous interpretations of the Act by the agencies charged with applying it. Pursuant to 31 U.S.C. 3711(e)(2), the Department of Justice and the General Accounting Office (GAO) are authorized to promulgate joint standards implementing the Act. Those agencies have consistently

[6] After enactment of the Act, Senator Percy, who sponsored the amendment excluding state and local governments from the definition of "person," opined that in his view the Act precluded imposition of prejudgment interest on those entities. As those courts that have considered the question have found, however, Senator Percy's *post hoc* views are not deserving of consideration, because there is absolutely no evidence that any other legislator was aware of or shared those views. App., *infra*, 9a; *Pennsylvania Dep't of Public Welfare* v. *United States*, 781 F.2d at 341 n.10. See generally *Bread Political Action Comm.* v. *Federal Election Comm'n*, 455 U.S. 577, 582 n.3 (1982); *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 132 (1974).

viewed the Act as preserving the federal government's common-law right to seek prejudgment interest from state and local governments.

Shortly after the adoption of the Act, the GAO issued a ruling in which it concluded that the Debt Collection Act did not preclude the Department of Agriculture from relying on the common law to collect interest from state and local governments. See Decision No. B-212222 of the Comptroller General (Aug. 23, 1983), reproduced at App., *infra*, 32a-36a. The GAO later reaffirmed that position. See Letter from the Comptroller General to Senator Charles H. Percy (Jan. 5, 1984), reproduced at App., *infra*, 37a-45a.

The GAO and the Department of Justice conducted joint rulemaking proceedings to develop regulations implementing the Act. The question whether common-law remedies survived the Debt Collection Act was explicitly raised in those proceedings. 49 Fed. Reg. 8889, 8891, 8894 (1984). The agencies concluded that "the Government has a judicially recognized common law right to charge interest on its debts" and that "the common law right to charge interest continues to exist." *Id.* at 8894. Accordingly, the final regulations implementing the Act provide that while "[t]he provisions of 31 U.S.C. 3717 do not apply * * * [t]o debts owed by any State or local government," federal "agencies are authorized to assess interest and related charges on debts which are not subject to 31 U.S.C. 3717 to the extent authorized under the common law or other applicable statutory authority." 49 Fed. Reg. 8901 (1984), 4 C.F.R. 102.13(i).

The Act is, at a minimum, reasonably susceptible of the interpretation given it by the GAO and the Department of Justice. Because that agency interpretation is a reasonable one, judicial deference is required. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984); *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, Nos. 90-1419 & 90-1769 (Mar. 25, 1992), slip op. 9. The rule of deference applies with particular force here, where the agency interpretation is a contemporaneous construction of the Act reflected in the implementing regulations. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

c. The court of appeals found that imposition of prejudgment interest on the State was impermissible under *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1 (1981), apparently because the relevant statutes do not themselves require payment of interest. App., *infra*, 13a; see also *Arkansas* v. *Block*, 825 F.2d at 1258 n.7; *Perales* v. *United States*, 598 F. Supp. at 24. The court's ruling on that issue squarely conflicts with the decision of the Tenth Circuit in *Gallegos* v. *Lyng*, 891 F.2d at 799-800, and is also inconsistent with the approach taken in *Riles* v. *Bennett*, 831 F.2d 875, 877-878 & n.4 (9th Cir. 1987) (per curiam), cert. denied, 485 U.S. 988 (1988). As those cases correctly reasoned, *Pennhurst* does not forbid requiring States to pay prejudgment interest on debts incurred in the course of their participation in federal programs. Prejudgment interest does not constitute "a new obligation for participating States," but is instead one of "the remedies available against a noncomplying State," and thus does not run afoul of *Pennhurst*. *Bell* v. *New Jersey*, 461 U.S. 773, 790 n.17 (1983). Moreover, the federal government's common-law right to prejudgment interest must be deemed part of the backdrop against which all contracts with the United States are entered into, and thus an attempt to enforce that right

is not a "new obligation" imposed administratively on the States.

3. The issue raised in this petition is a recurring and important one, as is evidenced by the number of court of appeals decisions addressing the question.[7] Moreover, while this issue would be sufficiently important to warrant this Court's review even if it were confined to the Food Stamp Program alone,[8] the issue is likely to arise in a wide variety of cooperative state-federal welfare benefit programs which possess similar characteristics. See, *e.g.*, *Riles* v. *Bennett*, 831 F.2d 875, 876-878 & n.4 (9th Cir. 1987) (per curiam) (deciding similar issue in context of federal education grant program), cert. denied, 485 U.S. 988 (1988). The Office of Management and Budget advises us that federal program grant assistance to state and local governmental entities will amount to approximately $182 billion in fiscal year 1992 and $200 billion in fiscal year 1993. The final resolution of this issue will undoubtedly affect many of those programs.[9]

[7] The court of appeals erred in suggesting that a recent amendment to the Secretary of Agriculture's claims settlement authority, 7 U.S.C. 2022(a)(1), resolves the issue presented in this case for claims arising after November 28, 1990. App., *infra*, 8a. That amendment, which was added to the Food Stamp Act by the Hunger Prevention Act of 1988, Pub. L. No. 100-435, § 602, 102 Stat. 1674, was in fact made retroactive to October 1, 1985. § 701(b)(5)(B), 102 Stat. 1678 (codified at 7 U.S.C. 2012 note). That provision does not provide for prejudgment interest on all claims arising under the Food Stamp Program, as the court of appeals apparently believed, but instead imposes a specific limitation on the Secretary's ability to collect prejudgment interest on state debts arising under the Department's quality control program, 7 U.S.C. 2025(c)(1)(C). In quality control cases, if the state pursues an administrative appeal, interest will accrue only after the appellate administrative decision, or two years after the bill was received by the State, whichever occurs first. This limitation on prejudgment interest for a narrow class of Food Stamp Program debts arguably undercuts the court of appeals' ruling that Congress abrogated prejudgment interest for the entire program in 1982, and in any event provides no support for the suggestion that the issue presented in this petition has been legislatively resolved.

[8] The Food Stamp Program is the largest of the cooperative state-federal welfare benefit programs, benefiting fully one in ten Americans.

As this Court recognized in *West Virginia* v. *United States*, prejudgment interest is a remedy to make the parties whole by preserving the real value of the dollar amount in dispute. "Th[e] federal interest in complete compensation is likely to be present in any ordinary commercial contractual agreement between a State and the Federal Government. In such a situation, it is also difficult to imagine a state interest that would justify relieving the State of its obligation to compensate the Federal Government fully for its efforts." 479 U.S. at 311. The same considerations are present here.

[9] In this particular case, the Department of Agriculture stands to lose more than $106,000 in prejudgment interest on the debts at issue here. The Department believes it is losing over $1 million per year in prejudgment interest from the States in the Second, Third, Fifth and Eighth Circuits as a result of the unfavorable rulings in those circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1992

APPENDIX A

UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

No. 91-8042

STATE OF TEXAS and TEXAS DEPARTMENT OF HUMAN RESOURCES, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA and U.S. DEPARTMENT OF AGRICULTURE, DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Western District of Texas

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Jan. 28, 1992

Before CLARK, Chief Judge, JONES, Circuit Judge and PARKER*, District Judge.**

ROBERT M. PARKER, District Judge:

I.

The State of Texas and the Texas Department of Human Services (Texas) appeal from the District Court's Order granting summary judgment in favor

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* District Judge of the Eastern District of Texas, sitting by designation.

** This opinion was concurred in by Chief Judge Clark prior to his resignation from the Court on January 15, 1992.

of the United States, and the U.S. Department of Agriculture (United States), and awarding prejudgment interest against Texas for the amounts due to the United States. The Court below found that the Food Stamp Appeal Board's decision holding Texas liable for mail issuance losses is not subject to judicial review. Appellant also contends that the District Court erred in permitting the assessment of interest against the state. We affirm in part and reverse in part.

II.

Texas incurred losses in its Food Stamp Program due to U.S. Postal Service employees stealing food stamps that had been mailed by the Texas Department of Human Services to qualified households. These losses are referred to as mail issuance losses. Texas continued to distribute Food Stamps by mail even after it became apparent that losses were unacceptably high, for the purpose of assisting an investigation into the thefts and the prosecution of the thieves. Food Stamp Policy Memo, Index No. 85-04 addresses the question "Can a state agency be relieved from liability for mail issuance losses that occur during the course of a Postal Service investigation? The answer given by the Policy Memo is:

> "For normal or routine Postal Service investigation of mail theft, State agencies will not be relieved from liability for mail issuance losses. . . . However, in extraordinary circumstances where the success of a Postal Service's investigation into heavy food stamp mail issuance losses is contingent upon the State's cooperation by continuing its mail issuance system, requests for relief from liability will be considered on a case by case basis by the FNS Regional Administrator.

> To be considered, the state must present a convincing argument that it is only continuing with mail issuance in the affected area to cooperate with the Postal Service investigation, and it must make its request in advance of the conduct of the investigation."

Texas did not request a waiver of strict liability prior to the investigation as required in Policy Memo No. 85-04. In fact Texas claims the Department of Human Resources had no record of receiving a copy of the Policy Memo, nor did any Texas official have knowledge of the memo or its criteria for requesting a waiver prior to the investigation in this case. The Policy Memo was issued on November 30, 1984, and properly indexed in 1985, thus giving Texas official notice of its existence and contents.

Texas was notified by the United States that she would be liable for $150,350.00 for mail issuance losses incurred during April-September 1986 and for $262,035.00 for mail issuance losses incurred during October 1986-March 1987. Texas was advised that interest would accrue beginning thirty (30) days after notice.

Texas sought waivers of liability for mail issuance losses in hearings before the Food Stamp Board on each case. The Board determined that tolerance levels were exceeded and affirmed Texas' liability in both cases. The letter notifying Texas of the Food Stamp Board's decision commended Texas for its efforts to cooperate with the U.S. Postal Service in an attempt to curb the thefts. However, the board declined to waive Texas' liability, stating that the efforts were no greater than was to be expected. Texas then filed suit in district court for a *de novo* review of the Board's action.

III.

The Congress established the Food Stamp Program to improve the nutritional well-being of low income individuals who would have difficulty purchasing a nutritious diet. 7 U.S.C. § 2011 et seq. The Texas Food Stamp Program is administered jointly by the federal government and the Texas Department of Human Services. Eligibility and benefit standards for participation in the program are set by the Food and Nutrition Service (FNS) of the United States Department of Agriculture, 7 U.S.C. § 2014(b). The Secretary of Agriculture is authorized to issue such regulations as he deems necessary or appropriate for the efficient administration of the Food Stamp Program. 7 U.S.C. § 2013(c). The cost of the food stamps is borne entirely by the United States. The cost incurred by the participating state in the administration of the program is divided between the state and federal governments. 7 U.S.C. § 2025(a). The actual, day-to-day operation of the Texas program is carried out by the Texas Department of Human Services (TDHS). TDHS has authority to deliver the coupons to eligible individuals by mail or over-the-counter. Mail issuance is cheaper, administratively easier and preferred by many recipients who are housebound or without transportation. When Food Stamps are placed in the mail and not received, they must be replaced. If the original coupons and their replacements are both redeemed, the cost to the federal government doubles for that issuance. In 1981, Congress added a section to the Food Stamp Program providing that the States would be liable for mail issuance losses "to the extent prescribed in the regulations promulgated by the Secretary." 7 U.S.C. § 2016(f). The FNS adopted regulations es-

tablishing a tolerance level of .05% above which the participating state is held strictly liable for mail issuance losses. Losses up to .05% are absorbed by the U.S. regardless of fault. 47 Fed.Reg. 50682, 7 CFR 274.3.

The Secretary has discretion to waive a valid claim, if to do so would serve the purpose of the statute. 7 U.S.C. § 2022(a)(1). The Food Stamp Policy Memo, Index No. 85.04 describes extraordinary circumstances where relief from liability for mail issuance losses may be considered. The Board determined in this case that a waiver of Texas' liability, requiring the federal government to bear the entire loss would be contrary to the intent and purpose of the regulations. The letter from the Chairman of the Food Stamp Appeals Board advising Texas of the Board's decision concluded with the following language:

> "Should the State of Texas be aggrieved by this final determination, it may seek judicial review and trial *de novo* by filing a complaint against the United States. . ."

IV.

Texas sought judicial review. The District Court granted the Motion for Summary Judgment filed by the United States Department of Agriculture holding that Congress bestowed upon the Secretary of the Department of Agriculture complete discretion in the decision to forego an otherwise valid claim against the state. Therefore, the Department's decision regarding the appropriateness of waiver in a particular case is not subject to judicial review. Texas brings her first point of error challenging the appropriateness of the summary judgment order. Texas alleges that there was evidence before the court below raising

a genuine issue of fact as to whether or not the Food Stamp Appeals Board recognized their authority under the law to waive strict liability under these facts. The United States answers that, first, the Board's decision is commited to agency discretion by law, and no exploration of the Board's reasoning is allowed. Second, the Board *did* consider the State's waiver application and declined to grant the waiver. Third, the State never asked the Board to consider Policy Memo 85-04, and so cannot now complain that the Board did not expressly consider it. Finally, the application of Policy Memo 85-04 to the facts as recited by Texas would have made no difference to the outcome of the proceeding. We agree.

The Secretary of the Department of Agriculture is authorized to issue such regulations "as he deems necessary or appropriate for the efficient administration of the Food Stamp Program." 7 U.S.C. § 2013 (c). The strict liability scheme was a valid exercise of statutory authority under 7 U.S.C. § 2016(f). The Department has authority to waive claims pursuant to 7 U.S.C. § 2022(a)(1) if the Secretary determines that to do so would serve the purposes of this chapter.

An agency decision not to take enforcement action is presumed to be unreviewable in the courts unless Congress imposes explicit restrictions on the scope of agency enforcement discretion, and provides judicially manageable standards for determining when the agency has violated those restrictions. *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985). Congress did not impose any restriction on the scope of agency discretion to grant waivers. There are thus no judicially manageable standards arising from the statute under which the Court can evaluate this case, because it involves an area in which Con-

gress empowered the agency with discretion to waive the charges it determines appropriate. The department's ultimate decision regarding appropriateness of a waiver in this particular case is not subject to judicial review. Texas argues, however, that Food Stamp Policy Memo, Index No. 85.04, created judicially manageable standards for determining if the agency abused its discretion. Even if this were true, we would not hold that the Food Stamp Appeals Board abused its discretion in failing to grant Texas relief under the Policy Memo. Texas was on constructive notice of the Policy Memo. Not only did the state not comply with that memo, but she failed to raise the applicability of the Policy Memo before the Food Stamp Appeals Board. We therefore affirm the the trial court's order granting summary judgment in this respect. We further find it unnecessary to undertake an analysis of whether or not the decision was arbitrary and capricious or an abuse of discretion.

V.

The Appellant next challenges the right of the Federal government to collect prejudgment interest on amounts owed by the state as a result of mail issuance losses in the Food Stamp Program. One circuit has allowed interest in this situation, *Gallegos v. Lyng*, 891 F.2d 788 (10th Cir.1989), while three other circuits have considered the issue and ruled that interest is not allowable. *Perales v. United States*, 751 F.2d 95 (2d Cir.1984) (per curiam), *affirming*, 598 F.Supp. 19 (S.D.N.Y.1984); *Pennsylvania Dep't of Public Welfare v. United States*, 781 F.2d 334 (3rd Cir.1986); *Arkansas by Scott v. Block*, 825 F.2d 1254 (8th Cir.1987). The Fifth Circuit has not addressed the issue.

At the heart of the controversy lies the interpretation of the Debt Collection Act of 1982, 31 U.S.C. § 3701, et seq. The act provides for interest against "persons" who owe past due debts to the United States. Section 3701 excludes from the definition of "persons" any agency of a state government. The exclusion under § 3701 does not prohibit interest assessments against state agencies in all circumstances. Congress is free to impose interest obligations by specific statutory authorization, as it has done in the Medicaid Act, 42 U.S.C. § 1396b(d)(5), and the Social Security Act, 42 U.S.C. § 418(j). However, the Food Stamp Act was silent on the issue of interest at the time the District Court entered its judgment. Congress has since amended 7 U.S.C. § 2022 adding that the State agency shall be liable for interest on any unpaid portion of a claim, and setting out the rate of interest and the time when it will begin to accrue. This amendment became effective on November 28, 1990, Pub.L. 101-624, § 1781(b)(2), fifteen days after judgment was entered in this cause, and therefore does not provide authority for the court's order in this cause. Neither party took the position before the District Court or this Court that the current interest provision in 7 U.S.C. § 2022 affects the outcome of this case.

Prior to the enactment of the Debt Collection Act of 1982, the courts had developed a body of common law to control when interest would be imposed. In the absence of an unequivocal prohibition of interest on statutory obligations, the Supreme Court fashioned rules which granted or denied interest by appraising the congressional purpose in imposing the specific obligation in light of "general principals deemed relevant by the Court." *Rodgers v. United States*, 332 U.S. 371, 68 S.Ct. 5, 92 L.Ed. 3 (1947). The District Court, relying on *Gallegos*, *supra*, found that the Debt Collection Act does not abrogate the federal government's common law right to assess interest on amounts owed by a state in this context. We disagree.

The language exempting state agencies from the Debt Collection Act was added to the bill on the Senate floor, and there is no available legislative history concerning it. Senator Percy, the author of the amendment, in a letter to the Comptroller General expressed his view that the Act was intended to abrogate the common law, and leave Congress free "to legislatively pick and choose according to circumstances, those situations in which the government might assess interest against those entities exempted by the Act." See *Pennsylvania Dep't of Public Welfare v. United States*, 781 F.2d 334, 341, n. 10 (3rd Cir.1986). An after the fact statement of a single legislator, even the amendment's author, is not entitled to probative weight in the determination of legislative intent. *Bread Political Action Committee v. Federal Election Com.*, 455 U.S. 577, 102 S.Ct. 1235, 71 L.Ed.2d 432 (1982); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). However, the interpretation articulated by Senator Percy is the only viable interpretation of the Debt Collection Act possible under the plain meaning of the statute.

The Appellees, like the Court below, rely on the reasoning expressed in *Gallegos v. Lyng*, 891 F.2d 788 (10th Cir.1989) to support their claim for interest.

First, the Eighth [*sic*] Circuit in *Gallegos*, *supra*, discusses the significance of *West Virginia v. United States*, 479 U.S. 305, 107 S.Ct. 702, 93 L.Ed.2d 639

(1987). The sole issue in *West Virginia* was whether the state was liable for prejudgment interest on a debt arising from a contract between the state and federal governments. The Court noted that the Debt Collection Act of 1982 was inapplicable because the claim arose under a contract entered into before October 25, 1982. The Court stated, "Moreover, we venture no opinion regarding the question whether this enactment [the Debt Collection Act of 1982] was intended to abrogate or leave intact the federal common law governing when a State must pay interest to the Federal Government." 479 U.S. at 312 n. 6, 107 S.Ct. at 707 n. 6, 93 L.Ed.2d 639. The *Gallegos* opinion notes that "while the Supreme Court expressly reserved the issue, its reference . . . to the relationship between the Debt Collection Act and the federal common-law right to collect interest at least suggests that the statute is not as ambiguous as appellant would have us find." 891 F.2d at 797. We decline to read anything into the *West Virginia, supra* opinion concerning the matter before this Court. That case simply reaffirmed the right of the Federal Government to prejudgment interest where the underlying claim is a contractual obligation entered into before the effective date of the act. The factual differences between that case and this one and the Court's express reservation of the issue before us precludes any reliance on the Supreme Court's ruling.

Second, the Eighth [*sic*] Circuit concluded, as we have, that there is no discernible legislative history to guide us with this question.

Third, having decided that the plain language of the statute and the lack of legislative history did not answer the question before them, the Court in *Gallegos* explored the purpose of the act itself. It discerned that the act was intended to tighten the collection process and create incentives for the timely payment of debts to the United States. It then concluded that to hold Congress to the literal meaning of their words and exempt state agencies from the payment of interest absent specific statutory authority to the contrary would create the absurd result of creating incentives for the nonpayment of state debts. We have no quibble with that statement of the purpose of the act. However, we do not agree that the states will have an incentive to shirk their debts incurred under the Food Stamp Act if no interest is allowed. The Food Stamp Act is a comprehensive legislative scheme for dividing financial responsibility for nutritional support for poor people between the States and the Federal Government. Under the Food Stamp Act state agencies are liable to pay the actual losses created by coupon shortages and unauthorized issuances. Unpaid claims for these losses can be recovered through offsets against the federal share of administrative funds to which the state agency is otherwise entitled. 7 U.S.C. §§ 2016(f) and 2022(a) and 7 C.F.R. 276. *Perales v. United States*, 598 F. Supp. 19 (S.D.N.Y.1984). The Congress was in the best position to decide the appropriate incentives or penalties to include in the Food Stamp Act. Congress elected not to include prejudgment interest in the initial statutory scheme. The Court cannot alter that decision. The 1990 amendment to the Food Stamp Act reaffirms our position that Congress does provide specific interest provisions where they are appropriate.

Fourth, the *Gallegos* opinion cites the principal that implied repeals of the common law are disfavored and should be found only where such a statutory pur-

pose is evident, citing *St. Regis Paper Co. v. United States*, 368 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961), and *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 72 S.Ct. 1011, 96 L.Ed. 1294 (1952). *Gallegos* characterizes their ruling allowing interest as an example of filling a gap left by Congress' silence in the Debt Collection Act of 1982. The Debt Collection Act is not silent concerning whether or not state obligations should be subject to prejudgment interest. The Act specifically excludes states from the payment of interest under the act. In § 3717(g)(1) the Act further specifies that the Act will not apply "if a statute, regulation required by statute, loan agreement or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges," thus allowing Congress to legislatively pick and choose where the imposition of interest is necessary. Having chosen clearly in the Food Stamp Act *not* to impose interest during the time period relevant in this case, the Courts are not free to "supplement" Congress' enactment. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978).

In further support of their conclusion, the Eighth [*sic*] Circuit noted that the General Accounting Office and the Comptroller General agreed with their construction of the statute, stating, "There is no evidence of congressional intent to prohibit . . . the assessment of interest and other charges against State and local governments when an agency of the Federal Government is acting pursuant to some other authority which may be available to it, whether founded in statute or common law." Decision of the Comptroller General (Aug. 23, 1983) at 2. We disagree with this interpretation of the statute and find neither persuasive reasoning nor precedent in the statement.

A final argument is addressed in the *Gallegos* opinion: whether interest improperly extends the terms and conditions under which the state had agreed to participate in the food stamp program in contravention of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.E.2d 694 (1981). *Pennhurst* held that legislation enacted pursuant to the spending power is much in the nature of a contract. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the states to exercise their choice knowingly, cognizant of the consequences of their participation. *West Virginia v. United States*, 479 U.S. 305, 107 S.Ct. 702, 93 L.Ed.2d 639 (1987) held that in the case of a contract between the state and the federal government, the federal courts are to determine the measure of damage, expressed in terms of interest, for nonpayment of the amount found to be due, *in the absence of an applicable federal statute*. Interest is an element of complete compensation. The purpose of interest is to make the injured creditor whole for the lost use of the money. Therefore, the Eighth [*sic*] Circuit found that *Pennhurst* did not bar the federal government's claim to prejudgment interest. The case before us, unlike *West Virginia*, *supra* involves an applicable federal statute. Therefore, this final argument also fails.

For these reasons, we hold that the Debt Collection Act of 1982 abrogated the federal common-law right to assess interest on outstanding debts of the states incurred under the mail issuance loss provision of the Food Stamp Act, prior to the November 28, 1990, amendment to the Act.

VI.

The District Court's order granting the United States' Motion for Summary Judgment is AFFIRMED.

The District Court's order that Texas pay prejudgment interest on the amount owed to the United States is REVERSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil No. A-87-CA-774
A-88-CA-820

STATE OF TEXAS, ET AL.

vs.

THE UNITED STATES OF AMERICA

ORDER

[Filed Nov. 13, 1990]

Before the Court is the Defendants' Motion for Summary Judgment, filed on November 8, 1989. The Plaintiffs filed a Brief in Opposition to Defendants' Motion for Summary Judgment on January 10, 1990, to which the Defendants filed a Reply on February 21, 1990. The Court has reviewed all of the motions on file in this cause, together with the exhibits and appendices attached thereto, and is of the following opinion.

In this action, the State of Texas [the "State" or the "Plaintiff"] challenges two decisions of the United States Department of Agriculture [the "Department" or the "agency" or the "Defendant"] which charge the State for the cost of replacing food stamp coupons

the State claims were stolen by employees of the United States Postal Service. In its first cause of action, the State seeks to challenge the application of a Department regulation which imposes strict financial liability on state food stamp agencies for the value, above a specified tolerance level, of food coupons lost through mail issuance.[1] In its Motion, the Defendant characterizes the Plaintiffs' first claim as a challenge to the validity of the regulation itself, but the Plaintiffs clarify in their Brief in Opposition that they challenge the strict liability nature of the regulation only as it applies to the State of Texas based on the facts presented here. The State concedes that "the Courts which have considered the issue of the validity of the mail loss regulation have consistently held that the statute gives the Secretary of Agriculture authority to prescribe the extent of a state's liability." *PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT*, at 7. The Plaintiffs' second claim is that the Department's refusal to exercise its statutory authority to waive mail loss penalties in this case constitutes an arbitrary and capricious abuse of discretion. Finally, in their third claim, the Plaintiffs seek to challenge the collection of interest by the Department on any amounts which are determined to be due from the State.

Under the statutory scheme adopted by Congress for the Food Stamp Program, the federal government

[1] The regulations adopted by the Food and Nutrition Service [FNS] to implement the mail loss statute are codified at 7 C.F.R. § 274.3. Interim regulations were adopted November 9, 1982. 47 Fed. Reg. 50681. The regulations were superceded by final regulations, adopted April 8, 1983. 48 Fed. Reg. 15223.

bears the entire cost of the food stamp coupons. The actual operation of the food stamp program is handled by the individual states, and the cost of administration is divided equally between the state and federal governments. 7 U.S.C. § 2025(a); 7 C.F.R. 272.2. The states are responsible for the "[i]ssuance, control and accountability" of the food stamps. 7 C.F.R. 271.4(a)(2). The states have available essentially two categories of options for distribution of the food stamp coupons, which are highly negotiable obligations of the United States, redeemable at face value. 7 U.S.C. § 2013. The states can deliver the stamps to recipients by mail or they can provide a reasonable method of over-the-counter distribution. 47 Fed. Reg. at 50681 (November 9, 1982).

Pursuant to its statutory authority, the Department made a decision to impose liability on the states for mail losses above 0.5%, below which the federal government would absorb the costs of issuing additional food stamps to cover those lost or stolen through the mail. The Department states that its objective was to establish a level that would "give State agencies a significant and realistic incentive to reduce mail losses, while taking care not to discourage mail issuance use where it is proving cost-effective and appropriate." 47 Fed. Reg. 50682. Recognizing that some portion of mail loss was unavoidable, the Department also asserts that one of its goals was to shift some portion of the cost of mail loses [*sic*] from the federal government to the states. *DEFENDANTS' MOTION FOR SUMMARY JUDGMENT*, at 21. The Department's application of the regulation and its corresponding 0.5% tolerance level resulted of mail loss charges of $150,350.00 for the State of Texas in 1986.

The Secretary of Agriculture is authorized to issue such regulations "as he deems necessary or appropriate for the efficient administration of the food stamp program." 7 U.S.C. § 2013(c). A challenge to the rulemaking activities of the Department is governed by the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* *See Rodway v. United States Department of Agriculture*, 514 F.2d 809, 817 n.14 (D.C. Cir. 1975). As stated, the State's first claim is a challenge to the Department's use of a strict liability standard for mail losses in its food stamp scheme. The challenged regulation was adopted by the Department pursuant to an express statutory command to shift some or all of the cost of food stamp mail losses to the states.[2]

The statutory authority is clear for the Department's enactment of a no-fault system of allocating losses incurred by the State's use of the mail to distribute food stamp coupons. In accordance with the concession by the State of the validity of the Department's authority to prescribe the extent of a state's liability, the Court finds that the strict liability scheme was a valid exercise of statutory authority under 7 U.S.C. § 2016(f). Based on the Plaintiff's concession, the Court does not find it necessary to elucidate further on this point. For further analysis as to the validity of the strict liability scheme of the food

[2] ". . . the State agency shall be strictly liable to the Secretary for any financial losses involved in the acceptance, storage and issuance of coupons . . . except that in the case of losses resulting from the issuance and replacement of authorizations for coupons and allotments which are sent through the mail, the State agency shall be liable to the Secretary to the extent prescribed in the regulations promulgated by the Secretary [of the Department]." 7 U.S.C. § 2016(f).

stamp program, *see Gallegos v. Lyng*, 891 F.2d 788 (10th Cir. 1989); *State of Arkansas By Scott v. Block*, 825 F.2d 1254 (8th Cir. 1987); *State of Missouri ex el David R. Freeman v. Block*, 690 F.2d 139 (8th Cir. 1982).

Although the Plaintiffs concede the validity of the Department's use of a strict liability scheme, they argue in their second claim that the scheme was misapplied in this case. Their argument rests on the Department's refusal to exercise its statutory authority to waive the charges against the State, which the State claims is an "arbitrary and capricious exercise of discretion." The Department argues that the proper standard for judicial review of the agency decision *not* to exercise its authority to waive the charges against the State is not the "arbitrary and capricious" standard because the decision is one that has been "committed to agency discretion by law." *See* 5 U.S.C. § 701(a)(2). The statutory authority under which the Department has authority to waive claims provides:

> The Secretary shall have the power to determine the amount of and settle and adjust any claim . . . arising under [the Food Stamp Act and or implementing regulations], . . . including the power to waive claims if the Secretary determines that to do so would serve the purpose of this chapter.

7 U.S.C. § 2022(a)(1). The Court finds that Congress intended to bestow upon the Secretary of the Department complete discretion in the decision to forego an otherwise valid claim against a state: "*if* the *Secretary determines* that to do so would serve the purposes of this chapter." *Id.*

In *Heckler v. Chaney*, 470 U.S. 821 (1985), the United States Supreme Court held that an agency decision *not* to take enforcement action is *presumed* to be unreviewable in the courts unless Congress imposes explicit restrictions on the scope of agency enforcement discretion and provides judicially manageable standards for determining when an agency has violated those restrictions. *See id.* at 830. The situation here is analogous to that in *Cheney* [*sic*] because both involve an agency's refusal to take requested enforcement action. The Court is of the opinion that the Department's decision in whether to waive an otherwise valid claim against the State is one "committed to agency discretion by law." For comparable holdings, *see Webster v. Doe*, 108 S. Ct. 2047, 2052 (1988) (finding that a statute which authorized the Director of the Central Intelligence Agency to terminate an employee "whenever the Director 'shall *deem* such termination necessary or advisable . . . ,' not simply when the dismissal *is* necessary or advisable," is a provision that "fairly exudes deference to the Director, and appears . . . to foreclose the application of any meaningful judicial standard of review"); *Gatter v. Nemmo*, 672 F.2d 343, 347 (3rd Cir. 1982) (finding that the refusal of the Veterans Administration to exercise statutory authority to renegotiate payment terms on defaulted mortgages was not subject to judicial review"); *Montgomery Ward & Co. v. Zenith Radio Corporation*, 673 F.2d 1254, 1262 (C.C.P.A. 1982), *cert. denied*, 459 U.S. 943 (1982) (holding that decision of the Secretary of the Treasury under a statute authorizing settlement of claims arising under customs laws was committed to agency discretion and stating that "[n]o situation is more within the category of 'no law to apply' than

the multifaceted judgmental decision to settle a claim").

In its Brief in Opposition, the Plaintiff argues that the Department's action in establishing procedures and criteria for the waiver process in its Food Stamp Program Policy Memo, Index No. 85-04, creates judicially manageable standards for determining whether the agency abused its discretion, and thus removed the waiver process from the type of action "committed to agency discretion by law." The Court does not find this argument persuasive, however. *Congress* did not impose any restriction on the scope of agency enforcement discretion that would remove decisions regarding waivers from the purview of the agency. There are no judicially manageable standards under which the Court can evaluate the instant case because it involves an area in which Congress empowered the agency with the discretion to waive the charges it "determines" appropriate. Therefore, the Court does not feel obligated to undertake an analysis of whether the Department's action constitutes an arbitrary or capricious abuse of discretion. However, the Court will consider the Plaintiffs' claims with respect to this issue in order to underscore the difficulty of judicial second-guessing of decisions which are committed to agency disecretion.

The Policy Memo referred to by the Plaintiffs is an explanatory statement accompanying the Department's 1986 pubiication of proposed revisions to the mail loss regulation. After explaining the Department's decision to maintain the existing policy of state liability for mail losses attributable to thefts by Postal Service employees, the Department indicated that it could "provide relief to the States where such is warranted." 51 Fed. Reg. at 12275. The Depart-

ment described the type of circumstances under which a waiver might be appropriate:

> For normal or routine Postal Service investigations of mail theft, State agencies will not be relieved from liability for mail issuance losses. . . . However, in extraordinary circumstances where the success of a Postal Service's investigation into heavy food stamp mail issuance losses is contingent upon the State's cooperation by continuing its mail issuance system, requests for relief from liability will be considered on a case by case basis by the FNS Regional Administrator. *To be considered*, the State must present a convincing argument that it is only continuing with mail issuance in the affected area to cooperate with the Postal Service investigation, and it must make its request in advance of the conduct of the investigation. The amount of liability waived will be only that amount of loss due to theft which is specifically documented in the investigation, and which occurred subsequent to the State's request for relief to FNS.

Id. (emphasis added).

The Court finds that the Department's statement did not create judicially manageable standards for review of waiver decisions. The Policy Memo may have articulated instances in which the Department would *consider* a waiver of charges, but the statement did nothing to restrict the agency's discretion in making the determination in a particlular case. In fact, the Policy Memo stated that waivers which met the threshold requirements of applying in advance of the losses and continuing with mail distribution only

to assist a postal service investigation would then be considered "on a case by case basis."

The State claims that the Department's decision to publish the waiver policy as a Policy Memo rather than a rule in the Federal Register caused the State to be unaware of the policy, and prevented the State from applying for a waiver in advance of its losses. The State claims that it never received the Policy Memo from FNS. Further, the State alleges that the State Food Stamp Appeals Board was unaware of the policy when it reviewed the validity of the State's claims in this case. It is on these bases that the State claims the Motion for Summary Judgment should be denied.

Under Federal Rule of Civil Procedure 56(c), summary judgment is to be granted if the record reveals no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding this question, the Court should view the evidence in the light most favorable to the party resisting summary judgment and should indulge all reasonable inferences in favor of that party. *See Pharo v. Smith*, 621 F.2d 656, 664 (5th Cir. 1980).

The State asserts "they would have qualified for a waiver because their cases met the criteria established in the policy memo." *PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT* at 16. The State goes on to claim that "[a]ny fair reading of the comments of the State Food Stamp Appeals Board suggests that they would have granted waivers except for their belief that they were prohibited by law from so doing." *Id.* at 18. The Court is of the opinion that the purported contested factual issues advanced by the State have no validity. The agency is required to

publish policy statements in the Federal Register only if they are general in nature: neither directed at specified persons nor limited to particular situations. *See Nguyen v. United States*, 824 F.2d 697, 700 (9th Cir. 1987); 5 U.S.C. § 551(a)(1)(D). The Policy Memo involved here is not general in nature, and the Department was not required to publish it in the Federal Register. Instead, the Department published the policy statement in the agency index, which was made available to the public as required under 5 U.S.C. § 552(a):

> (a) final order, opinion, *statement of policy* . . . may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—(i) it has been indexed and either made available or published as required by this paragraph; or (ii) the party has actual and timely notice of the terms thereof.

The Court agrees with the argument of the Department that "[i]f indexing alone is sufficient notice to a private citizen, then it is certainly more than sufficient notice to the agency of the State of Texas which administers the Food Stamp Program and, therefore, has an obligation to famiilarize itself with the federal policy. Since the statutory indexing requirement has been met, Policy Memo 85-04 can be relied upon as a basis for denying the State's request for a waiver, even if the State could prove that it never received a copy of the Policy Memo." *DEFENDANTS' REPLY TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT* at 8.

In response to the State's claim that it relied on erroneous advice from Department employees to the

effect that a waiver would not be granted under any circumstances, the Court agrees with the Defendant's characterization of the law: "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51, 63 (1984). It was the State's responsibility to know and comply with the Department's policy regarding the waiver of mail issuance losses. *Cf. id.* at 64.

In its Motion for Summary Judgment and its Reply, the Department supports with thoroughness its argument that the State did not meet the qualifications for waiver, and furthermore, that the State "cooperation" in the instant case was not the type for which the Department would have granted a waiver even if the State had applied in advance of the losses. The Court does not feel it necessary to rehash the explanation offered by the Department for two reasons. First, as stated, the Court is of the opinion that the Department's decision regarding the appropriateness of a waiver in a particular case is not subject to judicial review. Second, even under the standard espoused as controlling by the State, the Court finds that the Department's decision in this case was hardly arbitrary or capricious. In fact, the Department has offered more than sufficient justification for the decision in its well-reasoned Motion and Reply. In addition to the fact that the Plaintiff did not request a waiver in advance of its losses, and did not continue mail issuance only to cooperate with a postal service investigation, the Department points out that "this is not a case in which the mail issuance system, but for a handful of thieves, is otherwise sound. On the contrary, the Texas mail

issuance loss rate is the highest of any state and is more than twice that of the next highest state." *DEFENDANTS' REPLY TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT* at 25. The rejection of a waiver for the State in this case advances the objective of encouraging states to take effective measures to reduce losses, and to consider whether the mail issuance system is the most effective means of distributing the food stamp coupons. As the Department argues in its motion, "The incentive to improve the issuance system would be destroyed by the routine waiver of liability in every case in which it can be proven that mail issuance losses were attributable to thefts by Postal Service employees." The Court finds that the Department's decision was clearly within the bounds of 5 U.S.C. § 706, and not arbitrary, capricious, or an abuse of discretion.

In its third cause of action, the State challenges the right of the Department to collect prejudgment interest on any amounts determined to be due from the State. The Department in its Motion has undertaken an extensive analysis of the judicial decisions of other circuits with respect to this issue, and argues that although three courts of appeal have held that the Department has no authority to charge interest on mail loss debts owed by the states, *see Perales v. United States*, 751 F.2d 95 (2d Cir. 1984) (per curiam), *affirming*, 598 F. Supp. 19 (S.D. N.Y. 1984); *State of Arkansas v. Block*, 825 F.2d 1254 (8th Cir. 1987); *Commonwealth of Pennsylvania Department of Public Welfare v. United States*, 781 F.2d 334 (3rd Cir. 1986), the most recent decision on this issue by the Tenth Circuit in *Gallegos v. Lyng*, 891 F.2d 788 (10th Cir. 1989) presents a superior

analysis of the legal issues involved. The Court is inclined to agree.

Objections to federal government collection of interest on amounts owed by states as a result of mail losses in the Food Stamp Program have been based on a number of grounds. In *Perales*, *supra*, the Second Circuit held that prejudgment interest was not available to the federal government because the Food Stamp Act did not explicitly authorize it. The holding was based on the Supreme Court's decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). The Department correctly points out, however, that the authority of the holding in this context has been limited by the Supreme Court's decision in *Bell v. New Jersey*, 461 U.S. 773 (1983). In *Perales*, the Second Circuit found that the payment of interest on amounts due from the states for mail losses constituted a "new condition" on states who participated in the Food Stamp Program, which was contrary to the Supreme Court's holding in *Pennhurst* that in cooperative federal-state programs, a state is required to comply only with terms and conditions which it knowingly and voluntarily accepted. In *Bell*, the Supreme Court explained that the *Pennhurst* rule governs "in the context of imposing an unexpected condition for compliance" and does not limit "remedies available against a noncomplying State." *Bell*, *supra*, 461 U.S. 773, 790 n.17. Like the Tenth Circuit in *Gallegos*, the Court is of the opinion that the distinction recognized in *Bell* applies to the instant facts. The Department seeks not to impose a new condition on the state for participation in the Food Stamp Program, but rather, seeks compensation for the State's breach of its duty to pay for mail losses above the tolerance level of 0.5%. Therefore,

the Court declines to follow the approach of the Second and Eighth Circuits with respect to this issue.

The State's second argument against collection of prejudgment interest provided the basis of the Third Circuit's decision in *Commonwealth of Pennsylvania Department of Public Welfare v. United States*, 781 F.2d 334 (3rd Cir. 1986). There, the Third Circuit held that the Debt Collection Act prohibited assessment of interest on debts owed by a state to the federal government.[3] In *West Virginia v. United States*, 107 S. Ct. 702 (1987), the Supreme Court clarified application of the Debt Collection Act when a federal statute did not contain explicit authorization for the assessment of interest: "In the absence of an applicable federal statute, it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for nonpayment of the amount found to be due." *Id.* at 705. In *Gallegos*, the Tenth Circuit undertook a comprehensive analysis of whether the Debt Collection Act operated to bar the federal government from collecting interest on debts owed from states participating in the Food Stamp Program, and held that the lack of an express provision in the Food Stamp Act authorizing collection of interest against a state in default does not preclude the agency from assessing interest as an element of compensation. The Tenth Circuit stated that the purpose of the interest is not to punish a debtor by imposing a new condition,[4] but rather to repay the creditor for the loss of

[3] For a detailed discussion of the Debt Collection Act in the context of the Food Stamp Program, *see Gallegos v. Lyng*, 891 F.2d 788 (10th Cir. 1989).

[4] This reasoning should provide adequate response to the Plaintiff's third argument against collection of interest, namely, that it would amount to a penalty against the State for pursuit of a judicial remedy. The Court does not find merit in the State's argument on this point.

the use of funds it rightly should have been paid. The Ninth Circuit reached the same conclusion on comparable facts in *Riles v. Bennett*, 831 F.2d 875 (9th Cir. 1987) *cert. denied*, 108 S. Ct. 1291 (1988). The Court finds the reasoning of these cases to be sound, and therefore adopts such reasoning to hold that the Debt Collection Act does not abrogate the federal government's common law right to assess interest on amounts owed from a state in this context.

ACCORDINGLY, IT IS ORDERED that the Defendant's Motion for Summary Judgment is hereby GRANTED, and further ORDERED that the State of Texas pay prejudgment interest on the amount owed to the federal government in this cause.

SIGNED AND ENTERED this 13th day of November, 1990.

/s/ James R. Nowlin
JAMES R. NOWLIN
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil No. A-87-CA-774
A-88-CA-820

STATE OF TEXAS, ET AL.

vs.

THE UNITED STATES OF AMERICA

JUDGMENT

[Filed Nov. 13, 1990]

Came on this day for consideration the Defendants' Motion for Summary Judgment, filed November 8, 1989; the Plaintiffs' Brief in Opposition, filed January 10, 1990; and the Defendants' Reply, filed February 21, 1990. After consideration of said motions, the Court is of the opinion that there is no genuine dispute as to material issues of fact in this cause.

ACCORDINGLY, IT IS ORDERED that the Defendant's Motion for Summary Judgment is hereby GRANTED; and further ORDERED that the State of Texas pay prejudgment interest on the amount owed to the federal government under the Food Stamp Program for mail losses above the tolerance level of 0.5%.

SIGNED AND ENTERED this 13th day of November, 1990.

/s/ James R. Nowlin
JAMES R. NOWLIN
United States District Judge

APPENDIX D

[SEAL]

THE COMPTROLLER GENERAL OF THE
UNITED STATES
WASHINGTON, D.C. 20548

DECISION

FILE: B-212222 DATE: August 23, 1983

MATTER OF: Debt Collection—Administrative Offset and Interest against State and local governments.

DIGEST: Sections 10 and 11 of the Debt Collection Act of 1982, 31 U.S.C. §§ 3716 and 3717, authorize use of administrative offset and assessment of interest and other charges when collecting debts owed to Federal Government by "persons." Statute further defines "person" as not including agencies of State or local governments. Absent any indication of contrary legislative intent, sections 10 and 11 are not exclusive and do not prohibit use of offset or charging of interest against State or local governments when and to the extent authorized by some other statute or under the common law.

The Department of Agriculture has requested our decision concerning the meaning and effect of sections 10 and 11 of the Debt Collection Act of 1982, 96 Stat. 1749, 1754-1756. The question is whether these sections prohibit the use of administrative offset and the assessment of interest, processing and handling fees, or late payment penalty charges on debts owed to the Federal Government by State and local governments. As is explained below, we think they do not. Instead, it is our opinion that the language at issue simply exempts debts owed by State and local governments from the requirements of sections 10 and 11 of the Debt Collection Act. Such debts are still subject to administrative offset or the assessment of interest and other charges whenever authorized by other statutes or principles of common law.

The Debt Collection Act of 1982 made several amendments to the Federal Claims Collection Act of 1966 (FCCA), 31 U.S.C. § 3701 *et seq.* (formerly 31 U.S.C. § 951 *et seq.*). Section 10 of the Debt Collection Act added a new section 5 to the FCCA which authorizes agencies to collect a claim from a "person" by means of administrative offset. Section 11 amended section 3 of the FCCA to direct agencies to assess interest, processing and handling charges, and penalties on debts owed by "persons" under certain circumstances. Sections 10 and 11 have been codified as 31 U.S.C. §§ 3716 and 3717 respectively. Pub. L. No. 97-452 (January 12, 1983), 96 Stat. 2467, 2471-72.

Sections 10 and 11 by their terms applied only to debts owed by "persons," and both sections expressly provided, in virtually identical language, that "person" does not include any agency of the United States or of "any State or local government." 96 Stat. 1755 and 1756. These definitions have been combined and codified as 31 U.S.C. § 3701(c). According to Agriculture, some State and Federal agencies have construed this definition to mean that Congress intended to completely prohibit the Federal Government from using administrative offset or assessing interest (and the other charges specified) on debts owed by agencies of State or local governments. Agriculture has taken the position, however, and we agree, that the

restrictive definition contained in sections 10 and 11 does not prohibit Federal agencies from continuing to use administrative offset or assessing interest and other charges, pursuant to the common law or other statutory authority.[1]

We first considered the meaning of this definition in a letter to the Department of Justice, B-209669, December 17, 1982. In that letter, we noted that the legislative history of the Debt Collection Act does not disclose any explanation of the meaning or purpose of these provisions. It appears that the definition of "person" was inserted into sections 10 and 11 of the Act after the Senate and House bills were reported out of committee. The floor debates do not shed any additional light on the matter. Consequently, we have only the plain language of the Act to guide us.

In our view, this restrictive definition merely exempts those entities not included in the definition of "person" from the provisions of sections 10 and 11 of the Debt Collection Act. Those sections authorize or require certain actions to be taken with regard to debts owed by "persons;" yet State and local governments are not "persons" within the meaning of those sections. Consequently, those sections do not apply to debts owed by State and local governments. There is no evidence of congressional intent to prohibit the use of administrative offset or the assessment of interest and other charges against State and local governments when an agency of the Federal Government is acting pursuant to some other authority which may

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[1] *See, e.g., United States v. Munsey Trust Co.*, 332 U.S. 234 (1947) (common law right of setoff); *Young v. Godbe*, 82 U.S. (15 Wall.) 562, 565 (1873) (common law right to interest).

be available to it, whether founded in statute or common law.

In addition, section 10 expressly provides that it will not apply to any case in which another statute explicitly provides for or prohibits the use of administrative offset to collect claims owed to the United States. 31 U.S.C. § 3716(c)(2). Section 11 contains a similar proviso with regard to the assessment of interest and other charges authorized by that section. 31 U.S.C. § 3717(g)(1). Those two provisos clearly demonstrate that Congress did not intend, by the passage of sections 10 and 11, to repeal by implication any other pre-existing statutes which authorize or govern the use of offset or the assessment of interest and other charges. *Compare Morton v. Mancari*, 417 U.S. 535, 550 (1974).

Moreover, we presume that had the Congress intended to impose a comprehensive prohibition which impliedly repealed or abrogated common law principles concerning the use of administrative offset or the assessment of interest and other charges against all entities not covered by sections 10 and 11, it would have provided statutory language, or at least legislative history, to clearly express such a purpose or reasonably support such a construction. As the Supreme Court said in *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952):

> "Statutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."

As noted above, the legislative history is silent as to the intended impact of the definition of "person." "This silence is most eloquent, for such reticence

while contemplating an important and controversial change in existing law is unlikely. * * * At the very least, one would expect some hint of a purpose to work such a change, but there was none." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979). *See also United States v. Bellard*, 674 F.2d 330, 335 (5th Cir. 1982). Accordingly, we conclude that sections 10 and 11 do not abrogate the common law beyond the extent required by their terms.

For these reasons, it is our opinion that, to the extent that there is authority other than sections 10 and 11 of the Debt Collection Act of 1982 (whether founded in statute or common law), agencies of the Federal Government are authorized to use administrative offset, and to assess interest or other authorized charges against State and local governments, in order to collect debts owed to the United States. B-209669, December 17, 1982. *See also* 62 Comp. Gen. —— (B-210086, July 28, 1983).

/s/ Harry R. Van Cleve
for Comptroller General
of the United States

[SEAL]

COMPTROLLER GENERAL
OF THE UNITED STATES
Washington, D.C. 20548

B-212222 January 5, 1984

The Honorable Charles H. Percy
United States Senate

Dear Senator Percy:

This is in response to your letter of November 21, 1983 (which we received on December 5), concerning the effect of sections 10 and 11 of the Debt Collection Act of 1982[1] on the Government's common law rights to use administrative offset and to assess interest with respect to debts owed to the United States by state and local governments. As you know, it is our position that the Debt Collection Act does not abrogate preexisting common law rights beyond the extent required by its terms. We stated this position in a letter to the Department of Justice (B-209669, December 17, 1982) and in a decision to the Department of Agriculture (B-212222, August 23, 1983). You question the basis for our position.

At the outset, we note that the issue has been raised in a lawsuit filed against the Department of Labor.[2] The suit challenges the Labor Department's

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[1] Pub. L. No. 97-365 (October 25, 1982), 96 Stat. 1749. Sections 10 and 11 have been codified as 31 U.S.C. §§ 3716 and 3717. For consistency, references in this letter will be to the original enactment.

[2] *State of South Carolina CETA Consortium and Gloucester County, New Jersey v. Raymond J. Donovan*, United States District Court for the District of Columbia, Civil Action No. 83-1518.

authority to assess interest against state and local governments in view of section 11 of the Debt Collection Act, which the plaintiffs argue amounts to a prohibition. While the suit deals solely with interest and does not involve offset, the result will presumably be equally applicable to the interpretation of both sections 10 and 11. In view of this pending litigation, we think it would be inappropriate for us to formally reconsider our position at this time. However, it might be helpful to explain our position in somewhat more detail.

The Government has long asserted its right to use administrative offset and its right to assess interest, without the need for specific statutory authority. The Supreme Court has recognized these rights, and they have become important elements of the Government's debt collection activities.

With respect to administrative offset, the Supreme Court has stated that "[t]he government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him' (citations omitted)." *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947). See also *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 140 (1962); *Barry v. United States*, 229 U.S. 47 (1913); McKnight v. United States, [*sic*] 98 U.S. 179 (1878), *affirming* 13 Ct. Cl. 292 (1877); *Gratiot v. United States*, 40 U.S. (15 Pet) 336 (1841).

Similarly, the Court has sanctioned the Government's common-law right to assess interest on indebtedness. *Billings v. United States*, 232 U.S. 261 (1914); *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941). Where the debtor is a unit of state or local government, considerations of equity become more relevant (*Board of Commissioners v. United*

States, 308 U.S. 343 (1939)), but the basic right still does not depend on the existence of statutory authority.

Against this background, the Congress addressed both topics—administrative offset and interest—in section [*sic*] 10 and 11 of the Debt Collection Act. Both sections spoke in terms of debts owed by "persons," and both sections provided that the term "person" did not include units of state or local government.[3]

When we first considered the proper interpretation of the exclusions in sections 10 and 11 for state and local governments, we recognized that two approaches were possible. First was to view sections 10 and 11 as preempting their respective fields. Under this approach, the common law would be entirely replaced by the new legislation, and the exclusions for state and local governments would amount to prohibitions. The second approach was to view sections 10 and 11 as supplanting the common law only to the extent required by their terms, and to view the exclusions merely as exemptions from the new statutory provisions and procedures.

In adopting the latter approach, we applied the established principle of statutory construction that "Statutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). To support this proposition, we cited the Isbrandtsen case in our August decision, along with *Edmonds v. Compagnie Generale Transatlantique*,

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[3] Section 5(e) of the Federal Claims Collection Act of 1966, added by Pub. L. No. 97-365, § 10(2), and section 3(e)(8) of the Federal Claims Collection Act of 1976, added by Pub. L. No. 97-365, § 11. The subsections have been combined and codified as 31 U.S.C. § 3701(c).

443 U.S. 256, 266-67 (1979) and *United States v. Bellard*, 674 F.2d 330, 335 (5th Cir. 1982). Numerous other cases exist to support this principle, for example, *United States v. Tilleraas*, 709 F.2d 1088 (6th Cir. 1983); *Copeland v. Martinez*, 603 F.2d 981 (D.C. Cir. 1979); *Amoco Oil Co. v. EPA*, 543 F.2d 270 (D.C. Cir. 1976); *California-Western States Life Ins. Co. v. Sanford*, 515 F. Supp. 524 (E.D. La. 1981).

The case of *Copeland v. Martinez, supra*, provides a useful illustration. Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), authorizes courts in employment discrimination suits to award reasonable attorney fees to "the prevailing party, other than * * * the United States." The court concluded that the exempting language excluded the United States only from the *statutory* allowance of fees, and that it left undisturbed the common-law authority to award fees when a suit has been brought in bad faith. Thus, the court held that section 706(k), notwithstanding the exempting language, does not preclude a court from awarding attorney fees to the United States when it has been sued in bad faith. This result, the court noted, was fully consistent with the statutory purpose.

Thus, our position is based on a recognized concept of statutory construction. We did not, however, apply the rule of construction blindly. We applied it only after a careful analysis of the statutory language, the legislative history, and the overall legislative purpose. In our view, these three factors, which we will comment on in more detail, all support our conclusion.

The Debt Collection Act does not provide that "an agency may not use administrative offset to collect amounts owed by units of state and local government." It does not provide that "interest shall not be assessed against units of state or local government." It provides merely, as noted above, that the term "person" for purposes of sections 10 and 11 does not include units of state or local government. Thus, language could easily have been used to make it clear that the exclusions were to operate as prohibitions. Yet this language was not used, and the language actually employed does not compel this result.

As we stated in our August decision to the Department of Agriculture, the legislative history fails to provide guidance. The exclusionary language of sections 10 and 11 did not appear in the reported version of S. 1249 or H.R. 4613, the bills which became the Debt Collection Act. Thus, there is no relevant discussion in the committee reports. The exclusionary language appeared as part of an amendment which you proposed on September 27, 1982. We reviewed the relevant Senate and House floor debates and similarly found nothing to suggest that the exclusions were designed to operate as prohibitions.

It is true, as you note, that witnesses at hearings on H.R. 4614 in June and July 1982 [4] expressed concerns over how offset and interest might apply to debts owed by state and local governments. While H.R. 4614 is an unreported bill and was not one of the bills enacted as the Debt Collection Act, the hearings can be regarded as part of the overall legislative history in a broader sense. In response, we would note that the witnesses did not necessarily seek absolute

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[4] *Collection of Debts Owed the United States*, Hearings on H.R. 4614 before the Subcommittee on Administrative Law and Governmental Relations, House Committee on the Judiciary, 97th Cong., 2d Sess. (1982).

prohibitions. They were concerned with such things as clarification of definitions and procedural safeguards. While there may well have been a connection between this testimony and the ultimate insertion of the exclusions, we still found no legislative history to warrant concluding that the exclusions should be viewed as prohibitions. In addition, other witnesses at those hearings (for example, the representatives of the Department of Health and Human Services) specifically included debts of state and local governments in their presentations.

There are several possible explanations for the exclusionary provisions consistent with treating them as exemptions rather than prohibitions. For example, a major purpose of section 10 was to provide due process protections. The Supreme Court has held that states are not "persons" for purposes of the Due Process Clause of the Fifth Amendment.[5] The section 10 exclusion could simply have been a recognition of this. Alternatively, the section 10 exclusion could have reflected a view that the subject of indebtedness by state and local governments presented complexities best left to existing remedies or possibly dealt with in future legislation.

The same is true for interest. Section 11 authorizes the assessment of penalties and administrative costs as well as interest. The section 11 exclusion could have reflected a desire that penalties and administrative costs, which were not authorized under common law, should not be assessed against state and local governments, but that existing common law with respect to interest need not be disturbed.

[5] "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court." *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966). See also *The Constitution of the United States of America, Analysis and Interpretation*, S. Doc. No. 92-82, 92d Cong., 2d Sess. 1139 (1973).

You also note your concern over student loan defaulters. While we recognize that this was a major concern not only of yours but of all those involved in the process culminating in the Debt Collection Act, we found no indication that this concern should be viewed as excluding other types of indebtedness.

It has often been noted that a series of GAO reports starting in 1978 helped generate the awareness that led to the introduction of legislation to faciiitate collection of debts. See, for example, the report of the Senate Committee on Governmental Affairs on S. 1249, S. Rep. No. 97-378, page 2 (1982). Our reports dealt with indebtedness of state and local governments as well as other types of debts. *E.g., Federal Agencies Negligent in Collecting Debts Arising From Audits*, AFMD-82-32, January 22, 1982. An August 1982 report by the House Committee on Government Operations (Failure of Federal Departments and Agencies to Collect Audit-Related Debts, H.R. Rep. No. 97-727) cited our January report and discussed with approval the use of offset and the charging of interest with respect to audit-related debts. Although audit-related debts often involve state and local governments, the report drew no such distinction. While the report is not "direct" legislative history of the Debt Collection Act, it is nevertheless relevant as a contemporaneous congressional document expressing the views of at least its issuing committe on the same subject matter. In particular, this report demonstrates that, at that time, one of the committees which participated in and supported the passage of the Debt

Collection Act believed that adequate legal authority existed prior to and independent of the passage of the act to support the assessment of interest and the use of administrative offset against audit related debts in general, including those owed by units of state and local government.

Finally and perhaps most importantly, the major purpose of the Debt Collection Act of 1982 was "to facilitate substantially improved collection procedures in the federal government." S. Rep. No. 97-378, page 1. To construe the exclusions of sections 10 and 11 as prohibitions would not only result in the unavailability of the new statutory procedures, it would also result in a serious erosion of existing authority and would leave Federal agencies in a worse position than they were in before the legislation was enacted. We saw at the time, and continue to see, no compelling reason to do this. Our position—that the exclusions should be taken at face value and should be construed as doing nothing more than exempting state and local governments from sections 10 and 11 of the act—is, we believe, more consistent with the purpose of the statute.

As you have noted, many other Federal agencies share our view. One agency submitted the following comment:

> "The Department believes that the proposed rule must address, in an unambiguous manner, the fact that the Debt Collection Act of 1982 in no way abrogated pre-existing common law debt collection rights. * * *
>
> "The legislative history of P.L. 97-365 provides no guidance on the intent of Congress in excluding these debts from coverage under the Act. However, in order to fulfill the basic intent of the

> Act, that is to enhance the federal government's ability to collect its debts, it is essential that the proposed rule make clear what obviously must have been the Congressional purpose: to add to already existing claims collection authorities additional means to accomplish that intent. Thus, it is the Department's belief that the intent of Congress in passing the Debt Collection Act was to enact legislation which would, in addition to granting federal agencies authority to undertake certain claims collection activities not previously authorized (*e.g.*, offset of general debts from federal employees salaries), primarily facilitate, encourage and direct the agency's utilization of previously available claims collection mechanisms (*e.g.* administrative offset, use of credit reporting agencies and private collection agencies, assessment of interest). The Department believes that any other interpretation would effectively abrogate the purpose of Congress in passing the Debt Collection Act of 1982."

In sum, the issue is currently in litigation and we will of course reconsider our position if warranted by the results of that litigation. However, we feel that the position we have taken is reasonable, legally supportable, and consistent with the purpose of the Debt Collection Act.

Sincerely yours,

/s/ Harry R. Van Cleve
for Comptroller General
of the United States

APPENDIX E

STATUTES AND REGULATION INVOLVED

1. 31 U.S.C.:

§ 3701. Definitions and application

* * * * *

(c) In sections 3716 and 3717 of this title, "person" does not include an agency of the United States Government, of a State government, or of a unit of general local government.

* * * * *

§ 3717. Interest and penalty on claims

(a)(1) The head of an executive or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person that is equal to the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year, rounded to the nearest whole percentage point. The Secretary of the Treasury shall publish the rate before November 1 of that year. The rate is effective on the first day of the next calendar quarter.

(2) The Secretary may change the rate of interest for a calendar quarter if the average investment rate for the 12-month period ending at the close of the prior calendar quarter, rounded to the nearest whole percentage point, is more or less than the existing published rate by 2 percentage points.

(b) Interest under subsection (a) of this section accrues from the date—

(1) on which notice is mailed after October 25, 1982, if notice was first mailed before October 25, 1982; or

(2) notice of the amount due is first mailed to the debtor at the most current address of the debtor available to the head of the executive or legislative agency, if notice is first mailed after October 24, 1982.

(c) The rate of interest charged under subsection (a) of this section—

(1) is the rate in effect on the date from which interest begins to accrue under subsection (b) of this section; and

(2) remains fixed at that rate for the duration of the indebtedness.

(d) Interest under subsection (a) of this section may not be charged if the amount due on the claim is paid within 30 days after the date from which interest accrues under subsection (b) of this section. The head of an executive or legislative agency may extend the 30-day period.

(e) The head of an executive or legislative agency shall assess on a claim owed by a person—

(1) a charge to cover the cost of processing and handling a delinquent claim; and

(2) a penalty charge of not more than 6 percent a year for failure to pay a part of a debt more than 90 days past due.

(f) Interest under subsection (a) of this section does not accrue on a charge assessed under subsection (e) of this section.

(g) This section does not apply—

(1) if a statute, regulation required by statute, loan agreement, or contract prohibits its charging interest or assessing charges or explicitly fixes the interest or charges; and

(2) to a claim under a contract executed before October 25, 1982, that is in effect on October 25, 1982.

(h) In conformity with standards prescribed jointly by the Attorney General and the Comptroller General, the head of an executive or legislative agency may prescribe regulations identifying circumstances appropriate to waiving collection of interest and charges under subsections (a) and (e) of this section. A waiver under the regulations is deemed to be compliance with this section.

2. 4 C.F.R.:

§ 102.13. Interest, penalties, and administrative costs.

* * * * *

(i) *Exemptions.* (1) The provisions of 31 U.S.C. 3717 do not apply: (i) To debts owed by any State or local government;

* * * * *

(2) However, agencies are authorized to assess interest and related charges on debts which are not subject to 31 U.S.C. 3717 to the extent authorized under the common law or other applicable statutory authority.

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